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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-107

ALFRED HENRY MANUSZAK, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

ALFRED HENRY MANUSZAK, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Your petitioner, Alfred Henry Manuszak, prays that a writ of certiorari issue to review the judgment-order of the United States Court of Appeals for the Third Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (as yet unreported) appears at Appendix A, infra. p. 23. The Judgment of the United States District Court for the Eastern District of Pennsylvania appears at Appendix B, infra, p. 25. The opinion of the United States District Court for the Eastern District of Pennsylvania regarding the motion to suppress the wiretap evidence appears at Appendix C, infra, p. 27.

JURISDICTION

The judgment order of the United States Court of Appeals for the Third Circuit was entered on June 12, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I. Whether the court order authorizing the interception of wire communications was insufficient on its face.

II. Whether all of the communications intercepted must be suppressed when the court-authorized monitors deliberately disregard a statutorily commanded condition of the court's wiretap order and purposely intercept every conversation over the tapped line.

III. Whether the conversations of the petitioner must be suppressed where no inventory was ever caused to be served upon the petitioner, who was named in the application to intercept wire communications.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, IV Amendment,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon provable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. §2516(2). *Authorization for Interception of Wire or Oral Communications*

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub. L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 216.

18 U.S.C. §2518(4). *Procedure for Interception of Wire or Oral Communications.*

(4) Each order authorizing or approving the interception of any wire or oral communications shall specify—

* * * * *

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

* * * * *

(e) the period of time during which such interception is authorized, including a statement as to

whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

* * * * *

(8) (d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it *was not possible to furnish the* party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) The order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

Added Pub. L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 218

New Jersey Wiretapping and Electronic Surveillance Control Act.

N.J.S.A. 2A: 156 A-12. *Required Statements in Order; Scope of Order; Extensions and Renewals; Progress Reports.*

Each order authorizing the interception of any wire or oral communication shall state:

* * * * *

d. A particular description of the type of the communication to be intercepted and a statement of the particular offense to which it relates;

* * * * *

f. The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automati-

cally terminate when the described communication has been first obtained.

No order entered under this section shall authorize the interception of any wire or oral communication for a period of time in excess of that necessary under the circumstances. Every order entered under this section shall require that such interception begin and terminate as soon as practicable and be conducted in such a manner as to minimize or eliminate the interception of such communications not otherwise subject to interception under this act. In no case shall an order entered under this section authorize the interception of wire or oral communications for any period exceeding 30 days. Extensions or renewals of such an order may be granted for periods of not more than 30 days. No extension or renewal shall be granted unless an application for it is made in accordance with this section, and the court makes the findings required by sections 10, 11 and this section.

Whenever an order authorizing an interception is entered, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the court may require.

NJSA 2A:156A-16. *Service of inventory by judge; contents; inspection of intercepted communications, applications and orders*

Within a reasonable time, but not later than 90 days after the termination of the period of the order or of extensions or renewals thereof, or the date of the denial of an order applied for under section 13,[1] the

1. Section 2A:156A-13.

issuing or denying judge shall cause to be served on the person named in the order or application, and such other parties to the intercepted communications as the judge may in his discretion determine to be in the interest of justice, an inventory which shall include:

a. Notice of the entry of the order or the application for an order denied under section 13;

b. The date of the entry of the order or the denial of an order applied for under section 13;

c. The period of authorized or disapproved interception; and

d. The fact that during the period wire or oral communications were or were not intercepted.

The court, upon the filing of a motion, may in its discretion make available to such person or his attorney for inspection such portions of the intercepted communications, applications and orders as the court determines to be in the interest of justice. On an ex parte showing of good cause to the court the serving of the inventory required by this section may be postponed.

L. 1968, c. 409, §16.

NJSA 2A:156A-20. *Service of copy of order and application before disclosure of intercepted communications in trial, hearing or proceeding*

The contents of any wire or oral communication intercepted in accordance with the provisions of this act, or evidence derived therefrom, shall not be disclosed in any trial, hearing, or proceeding before any court of this State unless not less than 10 days before the trial, hearing, or proceeding the parties to the action have been served with a copy of the order and accompanying application under which the interception was authorized.

The service of inventory, order, and application required by this section may be waived by the court

where it finds that the service is not practicable and that the parties will not be prejudiced by the failure to make the service.
L. 1968, c. 409, §20.

NJSA 2A:156A-21. *Motion to suppress contents of intercepted communication or derivative evidence; grounds; appeal*

Any aggrieved person in any trial, hearing, or proceeding in or before any court or other authority of this State may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that:

a. The communication was unlawfully intercepted;

b. The order of authorization is insufficient on its face;

c. The interception was not made in conformity with the order of authorization.

STATEMENT OF THE CASE

Defendant Manuszak was convicted upon two counts of an indictment charging him with conspiracy and use of an interstate telephone facility in aid of an illegal gambling enterprise in violation of 18 U.S.C., Section 1952. Motions for acquittal and for a new trial were denied. Manuszak was placed on probation for six months and fined $500 on December 6, 1972.

Most of the government's evidence at trial came from recordings of defendant's conversations through telephone wiretaps installed by the New Jersey State Police pursuant to orders entered by Judge Kingfield of the Superior Court of New Jersey under the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A: 156 A-1 et seq. In the absence of these intercepted wire communications the government's evidence was conceded to be insufficient to sustain the conviction.

Judge Kingfield entered three orders authorizing wiretapping. Each authorized interception for thirty days. The first order was dated October 8, 1969 and authorized interception over telephone number 609-547-6570. During the course of this interception the monitoring officers learned that another telephone at the same location was also being used to promote an illegal gambling operation. As a result, application was made to tap this other telephone line and on October 29, 1969 the court authorized interception over this second line, 215-WA 5-4449. Both of these telephone numbers were listed to W. Ripka, 257 Crystal Lake Avenue, Audubon, New Jersey. On November 25, 1969 an application for extension of the tap on telephone number 215-WA 5-4449 was made and granted by Judge Kingfield. All interception terminated on December 6, 1969. The evidence at trial related only to the wire communications intercepted over telephone number 215-WA 5-4449 during the period from October 31, 1969 to December 6, 1969.

Before trial, defendant moved to suppress the contents of the intercepted communications. The facts and docu-

ments necessary to a determination of this motion were stipulated to by counsel on both sides. In his motion defendant alleged that the court orders of authorization were insufficient on their face. Three deficiencies were established. The orders do not specify (1) a particular description of the type of communication sought to be intercepted; (2) whether or not the interception shall automatically terminate when the described communication has been first obtained; and (3) that the interception must immediately terminate upon attainment of the authorized objection.

Defendant's motion to suppress also alleged that the communications were unlawfully intercepted and that the interceptions were not made in conformity with the orders of authorization. *In this regard it was stipulated that, despite Judge Kingfield's order that the State Police minimize or eliminate the interception of communications not otherwise subject to interception, the New Jersey Attorney General's office instructed the officers to intercept every telephone conversation with the exception of certain communications between an individual and his attorney.* These countermanding instructions to maximize the interception were in fact followed throughout the period of each of the interceptions ordered by Judge Kingsfield and as a consequence communications were intercepted which should not have been.

On February 6, 1970, two months after the termination of interception, Judge Kingfield ordered that an inventory be served upon W. Ripka and Joseph Patrick Ripka notifying them as required of the interception over telephone number 215-WA 5-4449. No other inventory order was entered as to that telephone number and to this day defendant Manuszak has never received an inventory as required by law. While W. Ripka and Joseph Ripka were specifically named in either the orders or the applications for interception, so also was an individual known as "Sassy Doc". In fact, the renewal application was granted in order to locate and identify "Sassy Doc". It has been stipulated that on December 6, 1969 members of the New Jersey State

Police identified the defendant Manuszak as the "Sassy Doc" referred to in the renewal application.

Defendant's motion to suppress evidence was denied and his intercepted conversations were used against him at trial over his continuing objection.

On December 13, 1972, Alfred Henry Manuszak filed his Notice of Appeal to the United States Court of Appeals for the Third Circuit. On June 12, 1973, the Court of Appeals affirmed the judgment of the District Court.

This petition followed.

REASONS FOR GRANTING THE WRIT

The federal questions presented in this case concern the unconstitutional application of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510-20.

The Act itself, and its application in this case, indicate that unconstitutional orders and practices can and are permitted. The questions presented indicate a need for this Honorable Court to exercise its power of supervision concerning the application of Title III, Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510-20.

I. The court order authorizing the interception of wire communications is insufficient on its face.

This case arises under the New Jersey Wiretapping and Electronic Surveillance Control Act, L. 1968, c. 409, N.J.S.A. 2A: 156 A-1 et seq., and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Sections 2510-20. Title III provided a legal framework for judicial authorization of federal eavesdropping and imposed federal standards for any state legislation authorizing eavesdropping by state officers. See 18 U.S.C. Section 2516(2) and 18 U.S.C. Section 2518. The New Jersey Wiretapping Statute is patterned after the federal model.

Title III sets forth precisely what each order authorizing the interception of communications must contain. 18 U.S.C. Section 2518(4). The New Jersey statute requires the same mandatory language. N.J.S.A. 2A: 156 A-12. Moreover, each statute provides that the evidence should be suppressed if the order of authorization does not contain the necessary language on its face. 18 U.S.C. Section 2518 (10(a)(ii); N.J.S.A. 2A: 156 A-21b.

The wiretap evidence introduced at trial was confined to the interception over telephone number 215-WA 5-4449 from October 31, 1969 to December 6, 1969. The court order authorizing that interception was entered on October 29, 1969 and renewed on November 25, 1969. While a single

deficiency is enough for suppression, each of the orders here is defective in the same several respects.

First, each order authorizing the interception of wire communications must contain *"a particular description of the type of communication sought to be intercepted*, and a statement of the particular offense to which it relates." 18 U.S.C. Section 2518(4)(c); N.J.S.A. 2A; 156 A-12d. The orders here nowhere describe the particular type of communication to be intercepted. The orders merely provide for the interception of communications relating to the offense of bookmaking and conspiracy. Such a statement says nothing about the conversation but only describes the offense to which it relates. Surely the description of the type of conversation to be seized must include more than a reference to the offense to which it relates for this reference is separately required by the above quoted portion of the statute. This was an important point in *Berger v. New York*, 388 U.S. 41 (1967). In that case the Supreme Court held that a New York eavesdropping statute did not meet Fourth Amendment requirements. Listing the ways in which the New York enactment was offensive, the Court put first "the statute's failure to describe with particularity the conversations sought." Id. at 58-59. This basic Fourth Amendment safeguard indicates the specific objective of the government in invading a citizen's privacy and the limitations placed upon the officer executing the warrant. Under it the officer could not continue to listen once the conversations sought have been seized. Justice Clark, writing for the majority in *Berger*, stressed that "the need for particularity . . . is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope." Id. at 56. Nor is the required particularity any more difficult to meet in a gambling case than in some other. The requirement has been typically met in recent federal court orders within the Eastern District of Pennsylvania by describing the conversations sought to concern "the transmission and re-

ceipt of wagers and lay-off bets on horse races and national sporting events, the receipt and dissemination of line information on horse races and national sporting events, the amounts won and lost."

Second, each wiretap order must contain *"a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained."* 18 U.S.C. Section 2518(4)(e); N.J.S.A. 2A: 156 A-12f. While Judge Kingfield found probable cause to believe that "more than one communication of the type described hereinabove will occur," his orders simply did not contain the mandatory language as to whether or not the monitor must terminate once the described communication has been first obtained. This circumstance has already been met in several state cases and in each instance it was held that the federal statute must be strictly followed and the evidence suppressed where the above quoted statement was omitted from the court's order. *State v. Lee*, — Md. App. —, 295 A. 2d 812 (1972); *State v. Siegel*, — Md. —, 292 A. 2d 86 (1972); *Johnson v. State*, 226 Ga. 805, 177 S.E. 2d 699 (1970); *Cross v. State*, 225 Ga. 760, 171 S.E. 2d 507 (1969).

Third, every wiretap order and extension must contain a provision that the interception *"must terminate upon attainment of the authorized objective."* 18 U.S.C. Section 2518(5). None of the orders in this case follow this language. Instead, each order provides only that the interception shall "end as soon as practicable". While the wording of these orders comes straight from the New Jersey statute, N.J.S.A. 2A: 156 A-12f, it simply does not comply with the minimum federal standards which govern here. 18 U.S.C. Section 2516(2); 18 U.S.C. Section 2518(5). Indeed, it is difficult to know why the New Jersey statute which tracks Title III in almost every respect diverged on this point, but the difference is substantial. Most recently, in *United States v. Cafero*, 473 F.2d 489 (3d Cir. No. 72-1577), this very court made note of the clear Congressional intent that the interception be terminated

automatically when the objective of the authorization is achieved, and made it very plain that:

> "Executing officers are not free to intercept beyond attainment of their objective for an hour, a day, seven days or twenty-nine days. They are allotted time to achieve an objective, period. Should they intercept beyond this time, they have violated the Act." 473 F.2d at p. 496.

Simply ordering the monitor to finish up as soon as he can is by no means the equivalent of language that interception must terminate automatically upon attainment of its objective.

II. When court authorized monitors deliberately determine prior to the initiation of an interception to disregard a statutorily commanded condition of the court's wiretap order and, instead of minimizing irrelevant interceptions, purposely intercept every conversation over the tapped line, all of the communications intercepted must be suppressed.

Every wiretap order must provide that the interception *"shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception."* 18 U.S.C. Section 2518(5); N.J.S.A. 2A: 156 A-12f. Judge Kingfield's wiretap orders included precisely this language. However, despite this clear mandate the State Police were instructed from the outset by the New Jersey Attorney General's office to intercept every telephone conversation with the exception of certain communications between an individual and his lawyer. These countermanding instructions to maximize the interception were in fact followed throughout the period of each of the interceptions ordered by Judge Kingfield and as a consequence communications were intercepted which should not have been.

This intentional defiance of the command to minimize by purposefully intercepting every conversation uttered

regardless of its investigative worth has already been condemned in New Jersey. *State v. Molinaro*, 117 N.J. Superior Ct. 276 (1970). The remedy for this patent violation of the command of the statute and the court's own orders is unfortunately not so clear.

United States v. Scott, 331 F. Supp. 233 (1971), concluded that *all* calls should be suppressed because of the government's complete failure to minimize. The court there said:

> "If this court were to allow all the Government agents to indiscriminately intercept every conversation made and to continue monitoring such calls when it became clear that they are not related to the 'authorized objectives' of the wiretap and in violation of the limiting provisions of the order, such order would become meaningless verbiage, and the protection to the right of privacy outlined in *Berger* and *Katz* would be illusory." Id. at 248

The opinion in *United States v. Leta*, 332 F. Supp. 1357 (1971), reaches the same conclusion:

> "There may be some situations in which it will be necessary to record 100% of the conversations over a particular phone. The necessity, by itself, would not make the seizure unreasonable. However, it may also be that 100% recording will take place *without an effort to minimize where possible*. In such a situation, 18 U.S.C. Section 2518(5) will have been violated and it would appear that under 18 U.S.C. Section 2518 (10), as well as the Fourth Amendment, *all* the seized conversations would have to be excluded from use by the Government." Id. at 1360. (Emphasis supplied).

United States v. King, 335 F. Supp. 523 (1971), however, came out differently. In that case, purposeful failure to minimize resulted in suppression of no more than that which should not have been intercepted in the first place. *Accord*, *United States v. La Gorga*, 336 F. Supp. 190

(1971); *United States v. Cox*, 462 F.2d 1293 (8 Cir. 1972); *State v. Dye*, 60 N.J. 518 (1972). The *King* case was argued before the Ninth Circuit in October, 1972.

United States v. Focarile, 340 F. Supp. 1033 (1972), analyzed *Scott*, *King* and *Leta* and ruled that a failure by the government to comply with the minimization requirement would require total suppression of all of the communications intercepted.

A similar question arose in *United States v. George*, 465 F.2d 772 (6 Cir. 1972). There the wiretap order provided that interception should take place only when certain named persons were identified to be using the telephone. This limitation in the order was never made known to the monitoring officers and the court held that "wiretap evidence secured without regard to the limitations set forth in the authorization order is inadmissible." Id. at 775.

Something remains to be said about Detective Roller's analysis that of 530 conversations intercepted only 10 did not involve gambling. *State v. Molinari*, *supra*, adopted the position that a purposeful failure to minimize will result in complete suppression only where the impermissible invasion of privacy was extensive. This should not be the law. Statistical breakdowns may be of some assistance in determining whether an effort to minimize was such as to comply with the court's order. Here, however, it is admitted that the State Police deliberately failed to conform with the court order of authorization. Nothing more need be shown to warrant suppression. 18 U.S.C. Section 2518(10)(a)(iii); N.J.S.A. 2A: 156 A-21c.

This is not the ordinary case where officers legitimately searching pursuant to a valid warrant seize some property which is beyond the scope of the warrant. Indeed, had the monitors here made the effort to minimize, the fact that a few "non-pertinent" conversations slipped through would never call for complete suppression. The point is that purposeful refusal to abide by a statutorily commanded condition of the court's order made the search illegal *ab initio*. The Statute is designed to prevent unreasonable

invations of privacy, not to repair them. The police action here effectively deleted from the court's order a provision without which the order itself would have been insufficient on its face.

There is an analogy here to *United States v. Eastman*, 465 F.2d 1057 (3rd Cir. 1972). In that case, the authorizing Judge expressly "waived" the post-search notice provisions of Title III at the time he authorized the interception. In suppressing the evidence in *Eastman*, this Court pointed out:

> "The touchstone of our decision on this aspect of the case at bar is not one in which an inventory was delayed but rather is one in which specific provisions of Title III were deliberately and advertently not followed." Id. at 1062.

In the face of such deliberate flouting and denigrating of the provisions of Title III, this Court cast aside the government's assertion that failure to file the inventory was a ministerial act and should result in suppression only where prejudice is shown. The point was emphasized in *United States v. Cafero*, 473 F.2d 489 (3rd Cir. 1973) where this court said:

> "Furthermore, any Fourth Amendment overtones of *Eastman* result not from post-search ministerial delay or error, but from a deliberate attempt initiated prior to the search to avoid procedures mandated following the search." At p. 499, 500.

III. Where no inventory was ever caused to be served upon one who was named in the application to intercept and whose conversations were overheard, those conversations must be suppressed.

On February 6, 1970, two months after the termination of interception, Judge Kingfield ordered that an inventory be served upon W. Ripka and Joseph Patrick Ripka notifying them as required of the interception over

telephone number 215-WA 5-4449. No other inventory order was entered as to that telephone number and to this day defendant Manuszak has never received an inventory as required by law. While W. Ripka and Joseph Ripka were specifically named in either the orders or the applications for interception, so also was an individual known as "Sassy Doc". In fact, the renewal application was granted in order to locate and identify "Sassy Doc". It has been stipulated that on December 6, 1969 members of the New Jersey State Police identified the defendant Manuszak as the "Sassy Doc" referred to in the renewal application.

Statutorily required procedures for the interception of wire communications under Title III, 18 U.S.C. Section 2518(8)(d), and under the New Jersey enactment, N.J.S.A. 2A: 156 A-16, call for the service of an inventory "on the persons named in the order or the application." Manuszak was so named. The inventory must be filed within a reasonable period of time, but not later than 90 days after the interception is terminated. The service of this inventory may be postponed, *not dispensed with*, only upon a showing of good cause to a judge of competent jurisdiction. The inventory must include notice of the entry of the order, the date of its entry, the period of authorized or approved interception, and whether or not wire communications were intercepted.

The possibility of completely surreptitious surveillance is the most telling objection to any system permitting electronic eavesdropping. These inventory procedures remove much of the force of this objection. The knowledge that the subject will routinely be informed of the surveillance should have a deterrent effect on abuse. In short, the inventory provision constitutes a key element in the system of checks and balances envisioned to prevent abuse and win the confidence of the community that the techniques are fairly employed. American Bar Association Standards on Electronic Surveillance, Section 5.15.

The absence of such a provision in an electronic surveillance statute was criticized in *Berger v. New York*,

388 U.S. 41, 60 (1967), since "it would [leave] full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties." See also *Katz v. United States*, 389 U.S. 347, 355 n. 16 (1967). Inventory procedures customarily applicable to conventional searches assume critical importance when electronic surveillance techniques are employed. The legislative history of the inventory provision of Title III bears this out. U. S. Code Cong. and Adm. News, 90th Congress, Second Session, 1968, p. 2194.

In *United States v. Eastman*, 465 F. 2d 1057 (3rd Cir. 1972), a panel of this Court composed of Circuit Judges Biggs, Van Dusen and Hunter said:

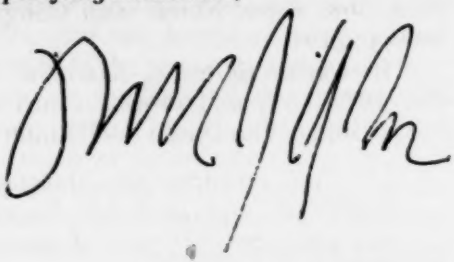
> "We construe the statutes, 18 U.S.C. Section 2518(8)(d) and 18 U.S.C. Section 2518(10)(a)(i), as requiring the exclusion of wiretaps secured in violation of their wording which implements the Fourth Amendment." Id. at 1063.

Under *Eastman, supra*, defendant Manuszak would be entitled to suppression. In *United States v. Cafero*, 473 F. 2d 489 (3rd Cir. No. 72-1577), however, a panel of this court composed of Circuit Judges McLaughlin, Aldisert and Adams severely limited *Eastman* to its own peculiar facts which involved a refusal to follow the post-search inventory provisions at the time the interception was originally authorized. Defendant maintains that the *Eastman* opinion does not warrant the restrictive reading of it given in *Cafero*.

CONCLUSION

The private thoughts and words of everyone are, in some way, affected by Title III. It is respectfully submitted that the public issues presented are so substantial in nature as to mandate the granting of this petition for writ of certiorari.

Respectfully submitted,



DONALD J. GOLDBERG
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1018

UNITED STATES OF AMERICA

v.

JOSEPH RIPKA, RAYMOND BAILEY, ARMAND JULIAN, DENNIS J. GAUL, ALFRED HENRY MANUSZAK, JOSEPH E. McMONAGLE

ALFRED HENRY MANUSZAK, *Appellant*

(D. C. Crim. No. 70-456)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6) June 12, 1973
Before GIBBONS, ROSENN and WEIS, *Circuit Judges*

Judgment Order

Appellant was convicted of illegal use of intrastate telephone facilities to conduct gambling operations, 18 U.S.C. §1952, and conspiracy, 18 U.S.C. §371. He was tried by the district court without a jury on stipulated facts. Most of the evidence against him consisted of record-

ings of his conversations obtained through wiretaps ordered by the Superior Court of New Jersey pursuant to N.J.S. 2A:156A-12 and 18 U.S.C. §2518. Appellant contends his suppression motion should have been granted, (1) because the authorization was insufficient on its face; (2) because the communications were recorded not in conformity with the order; and (3) because he was not served with an inventory of the interceptions. The tap was on the telephone of one Jerry Ripka. Each of these contentions have been dealt with in the opinion of the district court dated October 10, 1972 denying the suppression motion.

It is therefore ORDERED and ADJUDGED that the judgment of the district court is affirmed.

By the Court,

JOHN J. GIBBONS,
Circuit Judge

Dated: June 12, 1973

APPENDIX B

Judgment and Order

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 70-456

UNITED STATES OF AMERICA

v.

ALFRED HENRY MANUSZAK

On this 6th day of December, 1972, came the attorney for the government and the defendant appeared in person, and by Donald Goldberg, Esq., Counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a finding of guilty has been convicted of the offense of conspiracy and unlawful use of wire communication facilities in interstate commerce in violation of Title 18 United States Code Sections 2,371, and 1952 as charged in Counts 1 and 5 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that on Count 1, the defendant shall pay to the United States a fine in the sum of FIVE HUNDRED ($500.00) DOLLARS and is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SIX

(6) MONTHS. The execution of said sentence of imprisonment only is hereby suspended and the defendant is placed on probation for a period of SIX (6) MONTHS on the following terms and conditions: 1. the defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law; 2. that the defendant obey all local, state and federal laws; 3. that the defendant comply with the rules and regulations of the probation department. On Count 5 the same sentence is imposed as on Count 1, to run concurrently, except that there shall be no fine. Said sentence is to run consecutively to the period of probation imposed on Count 1 of Indictment No. 71-378. (A total probation period of 14 months.)

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

RAYMOND J. BRODERICK,
United States District Judge

JOHN J. HARDING,
Clerk

Filed Dec. 11, 1972

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 70-456

UNITED STATES OF AMERICA

v.

JOSEPH RIPKA, RAYMOND BAILEY, ARMAND JULIAN, DENNIS J. GAUL, ALFRED HENRY MANUSZAK, JOSEPH E. McMONAGLE

Opinion sur Motion of Alfred Henry Manuszak, to Suppress Evidence Obtained by Means of a Wiretap.

MASTERSON, J. October 10, 1972

The above-named defendants are charged with illegal use of interstate telephone facilities to conduct gambling operations.[1] A significant part of the Government's evidence consists of recordings of conversations through wiretaps installed on two New Jersey telephones in 1969, pursuant to several orders entered by Judge Frank J. Kingfield of the Superior Court of New Jersey. Defendants[2] have

1. 18 U.S.C. §1952. Defendants are also named in a related conspiracy count under 18 U.S.C. §371.

2. All defendants have filed Motions to Suppress except Joseph Ripka who is a fugitive and remains unrepresented at this time.

moved to suppress this wiretap evidence on several grounds ranging from the unconstitutionality of the applicable wiretap statutes[3] to the insufficiency of the applications and orders authorizing the taps, and nonconformity to the orders themselves.

The constitutional bases for suppressing the evidence secured by wiretap were recently discussed by Chief Judge Lord in *United States of America v. Matthew F. Whitaker, et al.* Criminal Nos. 70-324 and 70-515 (E.D. Pa., filed May 31, 1972). However, we have decided not to suppress the evidence on this basis while that decision is being tested on appeal.

The first non-constitutional contention is based on the fact that none of the defendants who are moving to suppress the wiretap evidence were provided with an inventory in connection with Judge Kingfield's orders.[4] However, we find the reliance on the recently decided case of *United States of America v. Gordon Eastman*, Nos. 71-1643 and 1644 (3rd Cir. filed August 8, 1972), to be misplaced. The Court of Appeals held that the deliberate failure to serve the notice or inventory on the defendants, as required by 18 U.S.C. §2518(8)(d), constituted grounds for suppression of the wiretap evidence. That section provides:

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3. 18 U.S.C. §2510 et seq., N.J.S.A., 2A; 156-A-1 et seq. Our decision must look to both these sections since the federal statute governing wiretaps procured by state prosecuting officials provides as follows:

> "The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant *in conformity with section 2518 of this chapter and with the applicable State statute* an order authorizing, or approving the interception of wire or oral communications . . ." 18 U.S.C. §2516(2). (Emphasis added).

4. Stipulation of Facts, paragraph 8.

"(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served *on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—*

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted. . . ." (Emphasis added).

In *Eastman*, the defendants moving for suppression of the evidence were clearly the persons named in the order authorizing the interception of the telephone communications. See the opinion of the District Court at 326 F. Supp. 1038 (M.D. Pa. 1971). In the present case, Judge Kingfield ordered the interception of the wire communications of "an individual known as Joe Rip and other unidentified persons."[5] After each order, Judge Kingfield directed service of an inventory on W. Ripka, Joseph Patrick Ripa and Louis James Vilotti.[6]

Several defendants argue, however, that although they are not one of the persons named in the order or application there is sufficient identification made to have required the service of an inventory. For example, defendant Manuszak points out that he is identified as

5. The order of October 8, 1969 names an individual known as "Jerry Ripka" and other unidentified persons.

6. See orders for Service of Inventory dated January 29, 1970 and February 6, 1970.

"Sassy Doc" in the renewal application of November 25, 1969, and that on December 6, 1969, agents of the F.B.I. and members of the New Jersey state police knew that "Sassy Doc" was the defendant Manuszak.[7] However, there is nothing in the record upon which we must make our decision which indicates that Judge Kingfield was made aware of this fact. Therefore, *Eastman*, in which the judge who ordered the interception explicitly stated that "notice to the [defendant] is hereby expressly waived," is not on point:

> "In the case at bar we have the extraordinary circumstance of an advertence to the provisions respecting . . . the inventory required by 18 U.S.C. §2518(8)(d) and an express failure by the New York Justice to adhere to these provisions. . . .
>
> *The touchstone of our decision on this aspect of the case at bar is . . . one in which specific provisions of Title III were deliberately and advertently not followed.* In other words the failure to file the notice is no mere ministerial act. It resulted from a judicial act which on its face deliberately flouted and denigrated the provisions of Title III designated for the protection of the public." *United States v. Eastman, supra*, slip opinion at 8 and 10.[8] (Emphasis added).

We are asked to hold that even if an inventory is not required by the language of 18 U.S.C. §2518(8)(d), this section is constitutionally infirm in not requiring service of an inventory on any "aggrieved person" as defined in 18 U.S.C. §2510(11). While this argument is

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7. Stipulation of Facts, paragraph 4.

8. We do not intend to imply that a deliberate or advertent attempt by the police to delude the judge authorizing the wiretap, so that notice is not given to the unnamed defendant, will not result in suppression under *Eastman*. We will re-examine our decision if the record can be supplemented to demonstrate such a state of affairs.

initially persuasive, we are satisfied that any weakness in the statutory framework due to the artificial distinction between "persons named in the order or the application" and others whose communications have been intercepted is cured by 18 U.S.C. §2518(9) which requires the furnishing to any defendant of a copy of the interception order and application at least ten days prior to any proceeding in the case. We are satisified that all of the defendants received whatever notice is required by the Constitution or Title III.[9]

Defendants' second group of arguments relate to the sufficiency of Judge Kingfield's orders. For example, we are asked to hold that "communications relating to the offenses of bookmaking and conspiracy" is not a "particular description of the type of communication sought to be intercepted" as required by 18 U.S.C. §2518(4)(c). We do not agree. See *United States v. Leta*, 332 F. Supp. 1357 (M.D. Pa. 1971). Nor do we find substance to defendants' assertion that the order is insufficient because it does not state "the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained." 18 U.S.C. §2518(4)(e). A reading of the Orders and Applications make it clear that a thirty (30) day period was contemplated, and that Judge Kingfield found that "more than one communication of the type described will occur."[10] Finally, defendants complain about the direction that "said interception will begin and end as soon as practicable and will be conducted in such a way as to minimize or eliminate the interception of communications other than the type described." This language

9. On November 4, 1970, we extended the limits of requisite notice by ordering the Government to make available to each defendant full and complete transcripts of all recorded intercepted communications made in connection with the case.

10. For example, see Finding of Fact Number 6 pursuant to the Order of October 29, 1969.

is taken verbatim from N.J.S.A. 2A 156-A-12, and we have concluded that this provision is directed to the same objective as the federal requirement, i.e., that "no order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization." 18 U.S.C. §2518(5).

We have examined defendants' remaining contentions as to the validity of the agents' applications and as to the agents' compliance with the Orders authorizing the interceptions and we find no substance to them. Accordingly, we will enter an order denying defendants' Motions to Suppress.

ORDER

AND NOW, this 10th day of October 1972, it is hereby ORDERED that defendants' Motions to Suppress are DENIED.

MASTERSON,
J.

SUPREME COURT, U. S.
SEP 27 19
No. 73-107
MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

ALFRED HENRY MANUSZAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-107

ALFRED HENRY MANUSZAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner asserts that evidence obtained by electronic interception should not have been admitted at trial, since, he contends, the order authorizing the interception was insufficient on its face, he did not receive the notice required by statute, and the interception was not minimized.

After a jury-waived trial on stipulated facts in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of having used interstate telephone facilities with intent to promote an illegal gambling business (18 U.S.C. 1952) and of having conspired to commit that offense (18 U.S.C. 371). He received concurrent six-month suspended sentences and was placed on probation for six months. He was fined $500 on the conspiracy count. The court of appeals affirmed (Pet. App. A).

Most of the evidence at trial was obtained from a court authorized electronic surveillance conducted by New Jersey State Police pursuant to an authorization under N.J.S.A. 2A: 156 A-1, *et. seq.* (New Jersey Wiretapping and Electronic Surveillance Control Act).[1] Before trial, petitioner filed a motion to suppress this evidence. The facts concerning the wire interception were stipulated; the motion was argued and denied by the district court in a written opinion (Pet. App. C). The court of appeals relied upon that opinion in affirming the conviction (Pet. App. A).

Petitioner raises here the same arguments that he advanced in support of his motion to suppress: (1) that the court order authorizing the interception was insufficient on its face since it failed to include (a) a description of the communications sought to be intercepted, (b) a statement indicating whether the interception was to be terminated when the described communication was first obtained, and (c) the requirement that the interception was to be terminated once the authorized objective was attained; (2) that the post-surveillance notice requirements of the state and federal statutes were not met as to petitioner; and (3) that the interceptions were not executed in a way which minimized the interception of communications not otherwise subject to interception.

Petitioner's first two contentions are answered in the opinion of the district court (Pet. App. C), upon which we rely. Regarding his third claim, which was likewise rejected by the courts below, we deem it appropriate to add the following.

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[1] The New Jersey statue is consistent with Title III of the Omnibus Crime Control and Safe Streets Act of 1968. See 18 U.S.C. 2516(2).

The New Jersey statute requires that each interception order must contain a provision that the interception shall be "conducted in such a manner as to minimize or eliminate the interception of such communications not otherwise subject to interception under this act." NJSA 2A; 156 A-12f. Accord, 18 U.S.C. 2518(5); see *State* v. *Dye*, 291 A. 2d 825, 835 (N.J.), certiorari denied, 409 U.S. 1090. The order in this case contained the quoted provision.

Contrary to petitioner's contention, there was no purposeful refusal to abide by this provision of the order. The telephone intercepted had been identified as one used exclusively in the conduct of the illegal gambling activity. Calls were monitored only during the hours the business was known to be in operation. In these circumstances, it was reasonable for the state law enforcement officials to conclude that essentially all calls over that telephone during those hours would be expected to be subject to interception.[2] Indeed, the results of the interception fully confirm the soundness of this conclusion, since only 10 of the 530 calls intercepted did not involve gambling. Petitioner does not suggest that further efforts at minimization could have avoided even the overhearing of these 10 calls, nor that the interception of these calls itself requires suppression of the relevant evidence. In any event, the minimization provision requires only that the intercept procedure shall be conducted in such a way as to reduce to the minimum possible the number of intercepted communications which do not provide evidence relating to the commission of any of the

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[2] The law enforcement officials did direct that no conversations between persons under state indictment and their attorneys should be monitored.

offenses enumerated in the statute. *United States* v. *Focarile*, 340 F. Supp. 1033, 1044-1050 (D. Md.), affirmed on other grounds, *sub nom. United States* v. *Giordano*, 469 F. 2d 522 (C.A. 4), certiorari granted on other issues, 411 U.S. 905. The procedures here accomplished this; accordingly, the court of appeals correctly affirmed the district court's finding that the interception of nonpertinent communications was minimized.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

DOJ-1973-09